

CHAPTER TWO
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PROCEDURES FOR STATE PROGRAM APPROVAL,
MODIFICATION, REVIEW, AND WITHDRAWAL

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PROCEDURES FOR STATE PROGRAM APPROVAL,
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A. Approval of New State Programs

(1) Background on Program Approval Process

A State's decision to seek approval to administer the NPDES program triggers a process designed to ensure that the State Agency or Agencies implementing the program have sufficient legal authority, procedures, and resources to properly manage and operate the various aspects of the program. The contents of a State program submission are prescribed in 40 CFR Part 123, and are described in detail in the succeeding chapters of this document. Part A of this chapter addresses the process by which a submission for a new State program is assembled, and appraises the State of the steps EPA will follow in evaluating the documents, including public involvement, prior to a decision on approval. These procedures also apply to program modifications, such as the addition of a new program component (See Part B of this Chapter).

There are a number of phases and activities that must be jointly undertaken by EPA and the State. Each step is important to the successful approval of the proposed program, although they may not always occur in the order outlined below. Steps may also be repeated when necessary to develop an adequate program. The final submission must assure that the program will be operated in full compliance with the CWA.

Approvals of State programs and revisions thereto are a joint function of EPA Regional Offices and Headquarters (both the Office of General Counsel and Office of Water Enforcement and Permits). Early and frequent involvement of all concerned offices will ease program development, review, and approval.

(2) Elements of State Program Submission

The contents of a State program submission are prescribed in Section 402(b) of the CWA and 40 CFR Part 123. A State seeking approval of a new program must submit all of these documents. Generally, a State also must submit each of these documents where it requests a program modification, although the information required for modifications is generally less extensive. For example, a State seeking approval of a federal facility modification need only submit legal authority necessary to demonstrate their ability to regulate such facilities, not the entire State NPDES regulations, unless other sections may affect the State's authority. Similarly, where a State is requesting a program modification because of proposed changes to the State/EPA Memorandum of Agreement, the State needs to submit only that document, although EPA could ask for additional information. The following documents are the elements of a State program submission (see 40 CFR 123.21).

- (a) Governor's Letter: A State program submission must include a request from the Governor of the State's program submission. For program modification, the request may be submitted by the State Director instead of the Governor.
- (b) Attorney General's Statement: The State must submit a statement from the Attorney General (or independent legal counsel where the State Agency has such a position) certifying that adequate authority exists

under State law to administer the program. The State Attorney General must explain the basis for his certification of authority. The contents of an Attorney General's Statement are explained in detail in Chapters 3 and 4, and a model Statement is included in Volume II.

- (c) Statutes and Regulations: The State must submit copies of all statutes and regulations that form the basis for the State program, including all authorities cited by the Attorney General. In addition, the State must submit any judicial decisions that may impact the adequacy of those authorities. Chapter 3 describes the required State statutory authority; Chapter 4 outlines minimum State regulations.
- (d) Program Description: The State must submit a description of the procedures the State will follow to implement the program. This description must discuss organization, program and enforcement procedures, and State resources and funding. In addition, the State must submit copies of all forms to be used in the program. The contents of the Program Description are discussed in Chapter 5.
- (e) Memorandum of Agreement: The State must submit a Memorandum of Agreement (MOA) between the State and EPA. This document outlines the respective program responsibilities of EPA and the State. The State must comply with all terms of the MOA. The contents of the MOA are set out in Chapter 5.

(3) Initial Program Development Process

- (a) State Review of EPA Regulations and Guidance on State Programs

A State, interested in receiving EPA approval to operate the NPDES permit program in lieu of the federal program, should begin its efforts to formulate a program submission by educating itself on the program's purposes, scope, and requirements. This may be accomplished by examining EPA's NPDES and pretreatment regulations, including the procedures for public involvement, in 40 CFR Parts 122, 123, 124, 125 and 403. In addition to program requirements, States should look at related substantive

requirements that States must adopt, such as effluent limitations guidelines in 40 CFR Chapter I, Subchapter N. (These substantive requirements are referenced in §123.25(a).) The State should also become familiar with the contents of this State program guidance document.

Current federal law and EPA regulations prohibit approval of partial NPDES programs. Therefore, the State must require permits for all point source discharges of pollutants within its jurisdictional boundaries, including federal facilities. In addition, the State must operate and enforce a pretreatment program according to the regulations in 40 CFR Part 403. States are not required to request authority to issue general permits. However, if a State does not receive approval of a general permits program, the State may not issue such permits to satisfy the NPDES program requirements. Any general permits issued by a State which has not been approved by EPA to issue such permits are not considered to be NPDES permits.

(b) State's Self-Evaluation

Once the State acquaints itself with the breadth and purposes of the NPDES program, the next step is a self-analysis of its legal authority to administer such a program and an estimation of the resources needed to run it effectively. The State's legal analysis should examine statutes, regulations, and judicial decisions to determine whether there is a need for State statutory amendments or new regulations. This review must examine authorities in light of the State's plan to

administer the program. The State should also begin plans to obtain the resources necessary to administer the program.

(c) Meeting with EPA

At this point, if it has not already done so, the State should alert EPA of its intentions, and seek advice on submission development. It is generally helpful to meet and review the existing relevant State legal authorities, if any, and anticipated program needs with the staff at EPA. The Regional Office will inform EPA Headquarters of the State's plans. Whenever possible, meetings at this stage should also include EPA Headquarters, in order to assure that all EPA concerns are raised at an early stage with adequate opportunity for discussion and State response.

(d) EPA Feedback on State Program Development

Following this original consultation, EPA Headquarters and the Regional Office will collaborate on a set of written comments and suggestions appraising the State's legal authorities and identifying any issues and concerns which need to be resolved through additional legislative or regulatory actions. This review should describe all changes to legal authority necessary to meet Federal requirements. While these comments should identify all necessary changes, it is possible that changes in the State's intended procedures will require different legal authorities from those reviewed, thus leading to additional EPA comments. For example, EPA's review of a statute may reveal adequate authority to administer the pretreatment program based on a State-run permit program.

If the State later indicates that it does not plan to issue permits to all indirect dischargers, EPA must re-examine the statute and may have new comments.

(4) Program and Document Development Process

(a) State Incorporation of EPA Comments

After receiving EPA's comments on the State's statutes and regulations, the State should begin to revise its authorities to reflect these comments. If necessary to resolve issues, all parties may meet to discuss the needed State revisions. Since legislative enactments are the common source of delay in the approval process, these changes should be pursued quickly. If the State can address most of EPA's comments at this early juncture, the remainder of the processes, especially EPA reviews, are far more likely to proceed expeditiously. The State should also begin preparing the other documents required for the program submission.

(b) State Transmits Draft Submission to EPA Regional Office

Once EPA recommendations have been incorporated, the State will assemble a complete draft program submission. The components of this submission are discussed above in part A(2) of this Chapter (pg. 2-2). Once assembled, the draft submission is to be forwarded to the appropriate EPA Regional Office for detailed review and comment.

(c) EPA Review of Draft Submission

The EPA Regional Office will provide EPA Headquarters, which must concur in the decision to approve a State program, with copies of the State's draft submission. EPA will then carefully review the State's application to determine whether it is consistent with the CWA and to ensure that EPA's approval of the program, as proposed by the State, will not be susceptible to legal challenge. EPA Headquarters and the Regional Office will coordinate their findings and provide the State with written comments on each draft submitted. (It is possible that EPA will request and/or that the State will choose to submit several drafts in order to avoid delays in action on the formal submission or a decision that the formal submission is not complete.)

(d) State Incorporation of EPA's Draft Submission Comments

Upon receipt of EPA's comments on the State's draft program submission, the State will revise its documents as necessary to incorporate, or otherwise resolve, EPA's comments. If this is not done, the program submission cannot be approved.

(5) Formal Program Approval Process

(a) State's Formal Submission

Once all components of the draft submission are revised as necessary to address EPA comments, the Governor will formally transmit the final submission to the EPA Regional Administrator, as provided by 40 CFR 123.21. The State must submit three (3) copies. Assuming that all earlier activity

has been well coordinated between the State, the Region, and EPA Headquarters, the remainder of the process should proceed rapidly. However, if all necessary changes have not been made or if draft materials were not submitted to EPA for preliminary review, delays are likely.

(b) Final EPA Review and Public Comment

The procedures for reviewing a State's formal program submission are set out in 40 CFR 123.61. First, within thirty (30) days of receipt of the package, the Regional Administrator makes a determination of whether the submission is complete. This completeness determination may only be made with the concurrence of the Director of the Office of Water Enforcement and Permits and the Associate General Counsel for Water. In determining whether the program submission is complete, EPA will look beyond whether each document is present, and will also examine whether the State has addressed all minimum requirements for a State program. A State program submission will not be considered complete if the legal authority does not meet minimum requirements or if significant changes are need to other portions of the submission. If the submission is complete, EPA has ninety (90) days to approve or deny the request for State program approval, although this period can be extended if the State agrees. If the submission is incomplete, the 90-day clock will not commence until EPA receives the additional materials.

Once a completeness determination is made, EPA will publish notice of the submission in the Federal Register and

in enough of the largest newspapers in the State to attract State-wide attention. In addition, the notice must be mailed to all interested persons and government agencies. The hearing must provide a comment period of at least forty-five (45) days and indicate that a public hearing will be held within the State. The meeting must be held no less than thirty (30) days after being noticed in the Federal Register.* The notice must also indicate where and when the State's submission will be accessible to the public and indicate the cost of obtaining a copy. The notice shall also delineate the fundamental aspects of the State's proposed program. Finally, the notice must indicate whom an interested member of the public may contact for additional information.

(c) EPA's Decision

Following the public comment period, EPA will complete its final review of the submission, considering all public comments on the proposed program. The Regional Administrator, with Headquarters' concurrence by the Director of the Office of Water Enforcement and Permits and the Associate General Counsel for Water, then makes a determination on whether to approve the program.

(d) Notice of an Approved Program

If EPA approves the program, the Governor will be so notified and a public notice (including a summary of responses

*/ The notice designating the time and place for the hearing may be included in the notice proposing approval.

to significant public comments) will be published in the Federal Register as well as mailed to all interested parties. The public notice must also explain the basis for EPA's decision. Following public notice, EPA generally turns its files over to the State Agency or Agencies which will be implementing the program and ends its permitting activities in the State. Note, however, that through the MOA, EPA and the State may agree that EPA will retain responsibility for certain permits in limited circumstances (such as where EPA has ongoing enforcement actions). This approach may not be used to authorize a partial program that would otherwise be prohibited by the Act.

In the event the program is not approved, EPA will notify the State and indicate the reasons for disapproval, and the revisions necessary for subsequent approval.

B. Program Modification Process

(1) State Program Modification Submission

Revisions to State programs may be necessary any time the State or federal programs change, such as the addition of a new program component (i.e., pretreatment, federal facilities or general permits), adoption of new or amended Federal laws (requiring changes to State laws), other changes to State laws, transfer of the program administration from one State Agency to another, and the adoption of revised State forms. Under federal rules, States must request a modification to their approved program in these cases prior to EPA review

and approval. Unless the CWA or EPA regulations specify a deadline for modifications to assure consistency with new or revised federal requirements, such modifications are expected to be made by approved States within a reasonable time. Program modification is often necessary to avoid inconsistencies between the State program and the CWA, and to assure the continuing validity of EPA's approval of the State program. Either EPA or the State may initiate the procedures for program modification.

The procedures for program modification are very similar to the original program approval process (See Part A of this chapter); States and EPA should follow those procedures, although some steps may be changed or omitted. There is one significant difference in process: for program reviews, the 30-day period for making completeness determination and the 90-day review period clock do not apply. There are no time limits for these actions in program revisions.

As with program approvals, early EPA involvement will facilitate action on program modification and eliminate delays. Program modifications may require the submission of a supplemental program description, MOA, Attorney General's Statement and copies of all legal authorities, where appropriate. EPA will determine the documentation necessary for each program modification (where the modification is to add a new program component, the State must submit all of these documents, although only in modified form).

(2) Substantial Modifications

Program modifications may be considered either substantial or non-substantial. If EPA determines the proposed modification is substantial, the NPDES regulations require that the modification be subjected to public notice and comment prior to EPA approval. For example, adding a pretreatment program is always considered a substantial modification (See, 40 CFR 403.10(h)). The Regional Administrator, with the concurrence of EPA Headquarters, will determine whether any other proposed modification is substantial by considering its scope, programmatic impact, and potential to arouse public interest or concern.

Public notices for substantial modifications must provide at least a thirty (30) day comment period, summarize the proposed revision and provide opportunity for the public to request a hearing. (Such hearings will be held where significant public interest is demonstrated.)

After consideration of the public comments and the requirements of the CWA, the Regional Administrator, with the concurrence of EPA Headquarters, will determine whether to approve or deny the modification. The modification does not become effective as a matter of federal law until approved by EPA. Approvals of substantial modifications will be publicly noticed in the Federal Register (as described above).

(3) Non-substantial Modifications

If the Regional Administrator, with concurrence of EPA Headquarters, determines that the proposed modification is not substantial, the Regional Administrator may approve or deny the revision, without public comment, by notice of his or her decision in a letter to the Governor or his designee (Program Director). Review of minor modifications should also be coordinated with EPA Headquarters. Minor changes in forms, procedures, and regulations will generally be considered non-substantial modifications. Proposed non-substantial modifications do not need to be subject to prior public notice in the Federal Register. Generally, final approval of non-substantial modifications need not be published either. However, any modification, substantial or not, which adds a component (e.g., federal facilities or general permit authority) to any State program will be published in the Federal Register.

C. Legal Review of Existing Programs

EPA has initiated a program to review the legal authorities for all approved State NPDES programs. It is expected that these reviews will need to be done periodically, perhaps every few years, depending on the degree to which federal and/or State law and program requirements change. These reviews are a joint Headquarters/Regional effort; Headquarters must concur in any determination of State program consistency or inconsistency with federal law. EPA will review the statutes and regulations in each State to determine whether they are

consistent with federal requirements. The required legal authorities are described in Chapters 3 and 4. The mechanisms for identifying and resolving deficiencies are set out in Chapter 6. This part outlines the review process. While reviews will focus on legal authorities, States and EPA will also review resources to determine whether they remain adequate.

(1) State self-evaluation

The first step in any legal review should be a State self-evaluation. The State should review statutes and regulations for consistency with federal requirements just as would be done for program approvals. The States should submit their conclusions on the legal analysis to EPA. In some cases, EPA may proceed directly to the next stage, in which case this step may be omitted.

(2) EPA Review of State Authorities

EPA will independently evaluate State legal authorities to determine consistency with federal requirements. The scope of this review will be the same as described for State self-evaluation, including State resources. The standard of review is the same as for approval of new programs; States are expected to have authorities that meet all federal requirements. Where the State has conducted its own self-evaluation, EPA will carefully consider the State's conclusions in formulating its comments. The review of State programs is a joint Regional/Headquarters activity; both offices must coordinate in preparing comments. EPA will then submit comments on the State's authority identifying needed revisions.

(3) State Revisions to Legal Authority and Resources

Once the State has received comments from the Region and Headquarters, the State will revise its statutes and regulations as necessary to address EPA's concerns. The State will then submit a request for program modification approval based upon these changes. In many cases, the State will also need to submit a revised Attorney General's statement addressing the modified authorities. EPA will act on this submission as described in Part B of this Chapter.

D. Withdrawal of State Programs

(1) Voluntary Withdrawal

According to 40 CFR 123.64(a), a State may, at any time, voluntarily transfer program responsibilities back to EPA by giving the Regional Administrator 180 days notice, and providing a plan for the orderly transfer of relevant program information necessary for EPA to administer the program. At least thirty (30) days in advance, the Regional Administrator must publish public notice of the transfer in the Federal Register and in enough of the largest newspapers of the State to provide statewide coverage, and mail notice to all permittees and other interested persons. A State may not return part of the NPDES program and retain other portions. If the program is transferred to EPA, the State must return the entire program.

(2) Involuntary Withdrawal

At all times after program approval, State programs must be consistent with the CWA and federal rules and must be

administered accordingly. Section 402(c)(3) of the CWA and EPA regulations (40 CFR 123.64(b)) allow the Agency to withdraw its approval of a State program which no longer complies with the requirements of the CWA and regulations thereunder. Program withdrawal is considered an extreme remedy but will be invoked in those cases where the State is unable or fails to take required corrective action to solve State program deficiencies. EPA will exercise great care to assure that the State is fully apprised of any program deficiency determinations by EPA at the earliest possible time and that a plan for corrective action on a reasonable schedule is developed. In some cases, EPA may decide to call for a public meeting to review EPA's concerns with a specific State program. EPA may not withdraw a part of the State program, leaving the State with partial authority. Any withdrawal applies to the entire approved program.

The Administrator may order the commencement of withdrawal proceedings on his own initiative or in response to a petition by an interested person alleging that the State has failed to comply with the requirements of the CWA or EPA regulations. Upon receipt of such a petition, the Administrator may undertake an initial, informal investigation to determine whether the State program is being administered in accordance with federal requirements. The Administrator may then either grant the petition and initiate the withdrawal process described below, or deny the petition.

(a) Criteria for Program Withdrawal

Grounds for initiating State program withdrawal proceedings are set out in 40 CFR 123.63, and include the following:

- (1) The State's legal authorities no longer meet CWA requirements;
- (2) The operation of the State program fails to comply with EPA regulations;
- (3) The State's enforcement program fails to comply with EPA regulations; or
- (4) The State program fails to comply with the terms of the Memorandum of Agreement.

(b) Procedures for Program Withdrawal

If the Administrator finds cause to commence withdrawal proceedings, he or she will issue an order designating the time and place for an adjudicatory hearing to be held. The order must also contain the issues to be considered at the hearing. The State has thirty (30) days to admit or deny the allegations. All parties may be represented by counsel and the party seeking withdrawal has the burden of coming forward with evidence of the allegations. Once the Presiding Officer has evaluated the record, he/she shall make a recommendation to the Administrator. Parties may file exceptions to this recommended decision. The Administrator must issue his/her decision within sixty (60) days of receiving the Presiding Officer's recommendation.

If the State Program is found to be deficient, the Administrator must provide up to ninety (90) days for the State to take corrective action. If this action is not

withdraw approval is a final agency action for purposes of judicial review.

A more detailed description of the withdrawal procedures may be found in 40 CFR 123.64(b)(3); also see Procedures for the Withdrawal of State NPDES Program Approval, General Counsel Opinion No. 78-7; April 18, 1978 in Volume II.